

**United States Government  
National Labor Relations Board  
OFFICE OF THE GENERAL COUNSEL**

## Advice Memorandum

DATE: July 24, 2006

TO : Michael McConnell, Regional Director  
Region 17

FROM : Barry J. Kearney, Associate General Counsel  
Division of Advice

SUBJECT: King Kong Restaurant  
Case 17-CA-23522

177-8520-0800

This Section 8(a)(1) case was submitted for advice pursuant to OM Memorandum 06-65 concerning the Employer kitchen manager's alleged threat to discharge any employee who attended an scheduled immigration rally.

We conclude that the Employer's kitchen manager was a Section 2(11) supervisor, however, that there is insufficient evidence to establish that he threatened employees to discourage attendance at the rally.

### FACTS

The Employer's restaurant is owned by Nicholas Triantafillou; Nicholas' daughter, Zoe, is Vice President of Operations with overall responsibility for the restaurant. In February 2006, Zoe hired Felix Rivas-Sanchez as a part-time kitchen manager responsible for eight of the restaurant's twelve employees. Sanchez asserts that he had the authority to discipline employees. Sanchez states that on one occasion, he sent an employee home for violating a cell phone policy without checking with Zoe.<sup>1</sup>

An immigration rally in the Employer's vicinity was scheduled for Monday, April 10, 2006. Sanchez states that on Thursday, April 6, Employer owner Nicholas telephoned Sanchez at work stating that he was worried that no employees would come to work on Monday because of the rally. Nicholas told Sanchez to make sure that everyone came to work that day. Sanchez replied that he would pass along that message. According to Sanchez, Nicholas called him again later that day and said that anyone not coming to work on Monday would be fired. Nicholas told Sanchez to pass on that message. Sanchez states that he approached five employee cooks seated at a table and told them what Nicholas had said. Sanchez states that he also told the cooks that

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<sup>1</sup> Zoe also states that Sanchez had disciplinary authority, but that he did not have authority to hire or fire.

it was up to them, they should do what they wanted, that we are all grown men. None of the cooks made any reply.<sup>2</sup>

The next day, April 7, Sanchez told Zoe that he was quitting. According to Sanchez, Zoe replied that she didn't know what to do because her father wanted to fire anyone who went to the rally. Concerning his decision to quit, Sanchez states that he was not forced to quit and that he was scheduled to be off work the day of the rally.

Sanchez states that he relayed Nicholas's threat of discharge to five employee cooks: Amador, Mendosa, a cook named "Chippa", and two more cooks whose names Sanchez does not remember. When contacted by the Region, Amador stated that he was never threatened with discharge by Sanchez or anyone else. Gutierrez, who is a cook but was not specifically named by Sanchez, also stated to the Region that he was never threatened with discharge by Sanchez or anyone else. The Region was unable to contact Mendosa; no employees contacted by the Region knew of any employee named "Chippa". Both Nicholas and Zoe deny that any threats were requested or made. Sanchez asserts that he knew of at least two employees attended the immigration rally: Nicholas's son who also worked in the restaurant, and cook Amador who Sanchez states was scheduled to be off work the day of the rally.

#### ACTION

We conclude that kitchen manager Sanchez was a Section 2(11) supervisor, but that there is insufficient evidence to establish that he threatened employees to discourage rally attendance.

Section 2(11) involves a three-part test for supervisory status. Employees are statutory supervisors if (1) they hold the authority to engage in any one of the 12 listed supervisory functions; (2) their "exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;" and (3) their authority is held "in the interest of the employer."<sup>3</sup>

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<sup>2</sup> [FOIA Exemptions 5, 7(c) and (d)]

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<sup>3</sup> Kentucky River Community Care v. NLRB, 532 U.S. 706, 713 (2001), citing NLRB v. Health Care & Retirement Corp. of America (HCR), 511 U.S. 571, 573-574 (1994).

Concerning the authority to discipline: "It is well established that the mere exercise of a reporting function that does not automatically lead to discipline or adverse action against an employee does not establish disciplinary authority."<sup>4</sup> The Board will not find that employees possess supervisory authority to discipline if they merely present the employer with evidence of poor performance or violations of the employer's rules or policies, without recommending disciplinary action.<sup>5</sup>

Sanchez states that he not only had authority to discipline employees, but that has sent an employee home for violating an Employer work rule. Sanchez's actual exercise of disciplinary authority demonstrates supervisory status.<sup>6</sup> Zoe, the Employer's Vice President of Operations, also admitted that Sanchez had disciplinary authority. Based upon Sanchez's actual imposition of discipline and Zoe's admission, we conclude that Sanchez was a Section 2(11) supervisor.

We also conclude, in agreement with the Region, that Sanchez's testimony is insufficient evidence to establish that he threatened employees to discourage rally attendance. Both Nicholas and Zoe expressly deny that any threats were requested or made. Two cook employees, including Amador who Sanchez states he actually threatened, deny that any threats were made to them by Sanchez or anyone else. There also is no evidence corroborating Sanchez's statement, i.e., no evidence that any allegedly threatened employees either declined to attend the rally or were discharged for attending the rally.

ULP Manual Section 10064 provides that credibility issues may be resolved administratively on the basis of compelling documentary evidence and/or an objective analysis of inherent probabilities, in light of the totality of the relevant evidence. Applying that standard, we conclude that the objective evidence here, consisting of

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<sup>4</sup> Lincoln Park Nursing Home, 318 NLRB 1160, 1162 (1995), citing Ohio Masonic Home, 295 NLRB 390, 393 (1989);.

<sup>5</sup> See, e.g., Williamette Industries, Inc., 336 NLRB 743, 744 (2001).

<sup>6</sup> Cf. Waverly-Decar Falls Health Care, 297 390, 392 (1989), 298 997 (1990), enfd. 933 F.2d 626 (8<sup>th</sup> Cir. 1991) ("The mere authority to issue oral and written warnings that do not alone affect job status does not constitute supervisory authority.")

uniform denials by the employees themselves and the complete lack of any corroborating evidence, is sufficient to discredit Charging Party witness Sanchez's testimony. Since the only evidence supporting the allegation is Sanchez's testimony, the Region should dismiss this allegation for insufficient evidence.

B.J.K.